Supreme Court, U.S.
FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-389

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT
SYSTEM OF OHIO
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal From The
United States Court of Appeals
For The Sixth Circuit

BRIEF OF AMICI CURIAE SUPPORTING APPELLANT BY THE COMMONWEALTH OF PENNSYLVANIA AND THE AMICI STATES APPEARING ON THE INSIDE COVER

LeROY S. ZIMMERMAN
Attorney General

SUSAN J. FORNEY
Senior Deputy Attorney General
(Counsel of Record)

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

(Additional Counsel Listed Inside)

Honorable Grace Berg Schaible
Attorney General of Alaska
State Capitol
Juneau, Alaska 99811

Honorable Joseph I. Lieberman
Attorney General of Connecticut
30 Trinity Street
Hartford, CT 06106

Honorable Warren Price, III
Attorney General of Hawaii
Honolulu, Hawaii 96813

Honorable Cary Edwards
Attorney General of New Jersey
Richard J. Hughes Justice Complex
CN-112
Trenton, NJ 08625

Honorable Kenneth O. Eikenberry
Attorney General of Washington
7th Floor, Highway Licenses Bldg.
Olympia, Wash. 98504

Honorable Charles G. Brown
Attorney General of West Virginia
State Capitol, Rm. 26-E
Charleston, W. Va. 25305

QUESTION PRESENTED

Whether the 1978 amendment to Section 4(f) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(2), requires employers to justify different disability retirement benefits afforded older and younger employees based on age-related cost factors, where the prior law did not require such a showing and where the amendment itself merely prohibits involuntary retirement based on age?

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INTEREST OF THE AMICI

The Commonwealth of Pennsylvania and the amici states, like all other states, maintain statutory retirement systems for their public employees. Like the retirement systems of the State of Ohio and other states, the retirement systems of the amici draw certain age-based distinctions in determining eligibility for, and amount of, regular and disability retirement benefits. Moreover, like the retirement systems of Ohio and many other states, the retirement systems of the amici states were created prior to May 1, 1974, when the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623 et seq., became applicable to the states. The Court's decision here is thus of great interest to the amici states, because it

will bear on the lawfulness of the distinctions used in their retirement systems, and since it will have a direct impact on the administration and funding of the benefits provided.

STATEMENT OF THE CASE

The Public Employee Retirement System of Ohio ("PERS") provides three types of retirement to eligible public employees: regular retirement; early retirement; and disability retirement. Regular retirement is available to any employee who is at least 70 years old. J.S. App. A31-32.[1] Disability retirement is available to employees under 60 who have at least five years of service and who are no longer physically able to perform the duties of their jobs. J.S. App. A3, A9. The age restriction on eligibility for disability benefits has been in place since 1933, well before the ADEA was enacted. J.S. 3.

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[1]J.S. App. refers to the appendix to the jurisdicitonal statement filed by PERS.

In June 1985, June Betts, a 61-year old employee of the Hamilton County Board of Mental Retardation and Developmental Disabilities became disabled and could no longer perform work-related duties. J.S. App. A21, A23. Her employer advised her that, unless she elected regular retirement, it would be forced to place her on unpaid medical leave. J.S. App. A23. Betts then applied to PERS for disability retirement benefits, which would have provided her a higher monthly benefit than regular retirement,[2] PERS denied

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[2]Because it had to equal at least 30% of Betts' final average salary, the disability retirement benefit for Betts would have equalled $355.02 per month. The early retirement benefit, which included no minimum benefit guarantee, was only $158.50 per month. J.S. App. A24.

her application because of her age. Ibid. Betts then elected to receive early retirement benefits, including health benefits, and to file suit under the ADEA, claiming that Ohio had compelled her to retire by denying her disability retirement. Ibid.

On cross-motions for summary judgment, the district court held for Betts. J.S. App. A20-A34. Although it agreed that the plan was "eminently just" since it provided benefits to persons who would "otherwise have no source of income during their disability," the court found that the plan discriminated against older workers on the basis of age. J.S. App. A25-A26. Moreover, it rejected PERS' argument that the "bona fide employee benefit plan" exemption in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), protected

the disability retirement provision, finding that the age limitation on eligibility for disability retirement benefits was not justified by significant age-related cost considerations and, therefore, that the program was not the "type of plan" contemplated by the exemption. J.S. App. A29. The court went on to hold that, by limiting Betts to a choice between regular retirement and unpaid medical leave, the employer and PERS had constructively discharged, and thus involuntarily retired, her in violation of § 4(f)(2)'s express prohibition. J.S. App. A30.

A divided panel of the Sixth Circuit affirmed without addressing either the constructive discharge or the involuntary retirement holdings. J.S. App. A2-A19. It began by noting that, under § 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), an employer "may not use age as a basis on

which to discriminate against an employee in the compensation, terms, conditions, or privileges of employment." Id. at A4. It further noted that, "[w]hen there is direct evidence that a benefit plan discriminates on the basis of age, the plan is unlawful unless it falls within the bona fide employee benefit plan - exception of 29 U.S.C. § 623(f)(2)" and that, in amending this exemption in 1978, "Congress expressly repudiated [this] Court's decision and reasoning in United Airlines v. McMann, 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose." J.S. App. A4. The court then concluded that, "[i]n light of this legislative intent," it had to

"agree" with the district court that "'the critical factor in [the] determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors'" (Ibid. (citation omitted)). Thus according to the Sixth Circuit, a benefit plan providing less valuable options to older workers would comply with the statute only where the cost of providing the older workers' benefits equals the cost of providing more generous benefits to younger workers. Id. at n.3.

In reaching this conclusion, the court accepted the reading of the 1978 amendment adopted by the Equal Employment Opportunity Commission, the Seventh Circuit Court of Appeals and the Third Circuit Court of Appeals. 29 C.F.R. 860.120(a)(1); 29 C.F.R. 860.120(f)(1)(iii); Karlen v. Colleges of Chicago,

837 F.2d 314 (7th Cir., 1988); Equal Employment Opportunity Commission v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988). At the same time but without saying so, it rejected the contrary position of the First, Eighth, Ninth and Tenth Circuit Courts of Appeals. EEOC v. Maine, 823 F.2d 542 (1st Cir. 1987), aff'g, 644 F.Supp 223, 226-27 (D.Me. 1986); IBEW Local 1439 v. Union Electric Co., 761 F.2d 1257 (8th Cir. 1985), aff'g, 585 F.Supp. 261, 264 (E.D. Mo. 1984); EEOC v. County of Orange, 837 F.2d 420, 422 (9th Cir. 1988); EEOC v. Cargill, 9 Emp. Ben. Cas. (BNA) 2609, 2611-12 (10th Cir. 1988).

SUMMARY OF ARGUMENT

In holding that a benefit plan is exempt from the ADEA under Section 4(f)(2) only if its variations in benefits are justified by age-related cost factors, the Sixth Circuit presumed that in 1978 Congress overruled all aspects of this Court's decision in United Air Lines v. McMann, 434 U.S. 192 (1977). Nothing in the language of the 1978 amendment to Section 4(f)(2) supports the court's presumption; nor, does the legislative history compel the result reached below.

The 1978 amendment simply prohibited exempt plans from mandating the retirement of employees based on age. It did not eliminate or redefine the subterfuge language discussed by this Court in McMann. Nor, did it limit

the exemption to plans with variations in benefits justified by age-related cost factors.

The legislative history, like the amendment itself, focused almost exclusively on outlawing mandatory retirement. There was no analysis of other employee benefit plan provisions, nor did Congress purport to address them. Moreover, the history makes clear that other than removing mandatory retirement provisions from the exemption, the amendment was not supposed to alter existing law which did not require justifications based either on age-related cost factors or on substantial business purposes.

Finally, if the decision of the Sixth Circuit is allowed to stand, it will create precisely the sort of disruption in the benefit plans of the

states that the exemption was intended to avoid. Many state systems that predate the ADEA draw distinctions similar to those drawn by Ohio in this case. If this Court upholds the decision below, then these plans will have to be substantially redesigned.

In McMann, this Court said that benefit plans should not be disrupted in the absence of an unambigious expression of congressional will. The Congress certainly did not express its intention to impose, on otherwise exempt plans, an obligation to justify their provisions on any basis let alone on the standards the Sixth Circuit would impose. Accordingly, the decision below should be reversed.

ARGUMENT

THE 1978 AMENDMENT OF SECTION 4(f)(2) DID NOT CHANGE THE STATUTORY MEANING OF SUBTERFUGE AS DEFINED BY THIS COURT IN UNITED AIRLINES, INC. V. MCMANN; NOR DID IT REQUIRE OTHERWISE BONA FIDE PLANS TO JUSTIFY DIFFERENCES IN BENEFITS BY SHOWING AGE-RELATED COST FACTORS

As originally enacted, Section 4(f)(2) of the ADEA (81 Stat. 603) provided that it would not be unlawful for an employer:

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual[.]

In United Air Lines v. McMann, 434 U.S. 192 (1977), the Court held that Section 4(f)(2) protected an involuntary retirement provision of a pension plan that had

been created prior to the enactment of the ADEA. The Court found that Congress had intended in Section 4(f)(2) to preserve the authority of employers involuntarily to retire employees pursuant to the terms of a bona fide pension plan. 434 U.S. at 197-202. And the Court held that the involuntary retirement provision at issue in the case was not a "subterfuge" to evade the purposes of the ADEA, because the provision had been adopted before the enactment of the ADEA and because there is no "per se rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act." 434 U.S. at 203.

In holding that Section 4(f)(2) applies only to age distinctions justified by significant age-related cost considerations (which it equated

with the "substantial business purpose" test referenced in the McMann decision), the court below suggested that, in amending Section 4(f)(2) in 1978, Congress overruled this Court's decision in McMann. We leave to Appellant and its other amici the task of explaining in detail why McMann was correctly decided and, concomitantly, why the age-related cost justification limitation imposed by the court below is inconsistent with the intent of the Congress that enacted the ADEA in 1967. We limit our discussion here to why Congress, in amending Section 4(f)(2) in 1978, did not alter the Court's interpretation of the "subterfuge" provision, or add either a "substantial business purpose" or an "age-related cost justification" standard to Section 4(f)(2).

A. The Language Of The 1978 Amendment Is Clear And Provides No Support For The Decision Below

As this Court has often recognized, the starting point in every case involving statutory construction is "the language employed by Congress." American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982), quoting, Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979). Moreover, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." American Tobacco Co. v. Patterson, supra, at 68, quoting, Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

In this case the language of the 1978 amendment is perfectly clear. It added a proviso to the Section 4(f)(2) exemption for bona fide benefit plans

which states that "no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual specified by Section 623(a) of this title because of the age of such individual [.]" 29 U.S.C. § 623(f)(2). The amendment did not alter the language authorizing an employer "to observe the terms . . . of any bona fide employee benefit plan which is not a subterfuge to evade the purposes of [the ADEA] . . ." Id. Nor did it repudiate this Court's interpretation of that language in McMann by further defining subterfuge or by adding an age-related cost factor test, or for that matter, any other test, to be met by bona fide plans.

If Congress wished to limit the Section 4(f)(2) exemption to the extent the Sixth Circuit suggests, it easily could have done so. The fact that it

did not should end this Court's inquiry. Central Trust Co. v. Creditors Committee, 454 U.S. 354, 359-60 (1982).

Nonetheless because the Sixth Circuit based its interpretation of the amendment entirely on what it perceived to be the legislative intent, we will proceed to address it.

B. The Legislative History Does Not Support An Age Related Cost Factor Test.

In adopting the age-related cost factor test, the Sixth Circuit discounted the plain language of Section 4(f)(2) and focused instead on what it considered to be the motive of Congress in enacting the 1978 amendment. Even if this Court were to accept the Sixth Circuit's novel approach to statutory construction, the legislative history would not support the decision below.

This Court has been "extremely hesitant to presume general congressional awareness of . . . a few isolated statements in the thousands of pages of legislative documents," and it has been even more reluctant to equate such awareness with "amendment of . . . the

rather plain meaning . . . (of statutory) language." SEC v. Sloan, 436 U.S. 103, 121 (1978)(parenthetical material supplied). Nonetheless, that is exactly what the Sixth Circuit did in this case. The court focused on one statement in the Conference Committee report on the 1978 amendment in which the conferees disagreed with this Court's holding and reasoning in McMann, and used that to read an age-related cost factor test into the Section 4(f)(2) exemption. In so doing, the court ignored the bulk of the legislative history which makes it clear that while Congress disagreed with the result in McMann, the thrust of the 1979 amendment was to eliminate mandatory

retirement provisions from the exemption.[3] Indeed, the very report cited by the court below states that the amendment was a "clarification of Section 4(f)(2) of the Act to prohibit the mandatory retirement of an employee within the protected age group pursuant to a bona fide employee benefit plan or seniority system which requires or permits such treatment." Conf. Rep. No. 950, 95th Cong., 2d Sess. (March 14, 1978), reprinted in EEOC Legislative History, at 518.

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[3]In doing so Congress did not purport to prelude employers from proving that age is a bfoq for certain jobs, thus justifying mandatory retirement provisions in specific cases. See Western Airlines v. Criswell, 472 U.S. U.S. 400 (1985).

Comments of various members of Congress in debating the amendment bolster the conclusion that other than removing mandatory retirement from the ambit of the exception, existing law was to remain unchanged. A co-sponsor of the bill in the House described the amendment as an "effort to close the loophole in existing law which allows mandatory retirement below age 65 when provided for in a bona fide employee benefit plan." 123 Cong. Record 29005 (September 13, 1977)(comments of Representative Findley), reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967 at 402 (1981)("EEOC Legislative Hisotry"). Another co-sponsor noted that while under the section "employers could hire older workers and benefit from their employment experience without

having to incorporate them fully into company benefit plans or seniority systems", the amendment would ensure that it could not "be used to force them into early retirement"[.]", 123 Cong. Rec. 29013 (Sept. 13, 1977)(remarks of Representative Weiss), reprinted in EEOC Legislative History at 410.[4]

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[4]The remarks of other Congressmen, too numerous to quote, establish that they too understood that, in supporting H.R. 5383, they were simply advocating the removal of age-based mandatory retirement provisions from the exemption. See 123 Cong. Rec. 29007 (Sept. 13, 1977)(remarks of Rep. Biaggi), reprinted in EEOC Legislative History at 404; 123 Cong. Rec. 29009 (Sept. 13, 1977)(remarks of Rep. Pepper), reprinted in EEOC Legislative History at 406; 123 Cong. Rec. 29010 (Sept. 13, 1977)(remarks of Rep. Wampler) ("The essence and intent of raising the age of protection to 70 under the Act is clarified in H.R. 5383 by amending Section 4(f)(2) to prevent bona fide seniority systems and pension

(FOOTNOTE CONTINUED)

The debate in the Senate took a similar course. In describing the proposed amendment, Senator Kennedy said:

> The bill clarifies the Congressional intention behind the exception to the Act which allows lesser benefits to be given to older workers in pension, retirement and insurance plans. The purpose of this provision was to ease the way for employment of older workers by allowing some differentiation in the fringe benefits that they

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(FOOTNOTE CONTINUED)

plans from containing mandatory retirement ages for employees protected by the Act."), reprinted in EEOC Legislative History at 407; 123 Cong. Rec. 29011 (Sept. 13, 1977) (remarks of Rep. Cohen) (H.R. 5383 amends the Act in order to reduce the incidence of mandatory retirement), reprinted in EEOC Legislative History at 408; 123 Cong. Rec. 29012 (Sept. 13, 1977)(remarks of Rep. Grassley) (amendment will reduce the incidence of mandatory retirement), reprinted in EEOC Legislative History at 409.

> would get. But a couple of courts have interpreted the provision to allow for the discharge of workers even if they would otherwise fall under the Act's protection, so long as they were not covered by a pension plan. We now make clear that the differentiation is allowed for purposes of fringe benefits alone and not for purposes of allowing an earlier retirement age.

123 Cong. Rec. 34323 (Oct. 19, 1977) (remarks of Senator Kennedy), reprinted in EEOC Legislative History at 510; See also 124 Cong. Rec. S4449 (daily ed. March 23, 1978)(remarks of Senator Williams), reprinted in EEOC Legislative History at 538.

The legislative history does reflect Congress's dissatisfaction with this Court's decision in McMann. For the most part, however, that dissatisfaction stemmed from the result in that case and cannot be read as a wholesale

rejection of the Court's approach to the subterfuge issue. See Conf. Rep. No. 950, 95th Cong., 2d Sess. (March 14, 1978), reprinted in EEOC Legislative History at 519; 124 Cong. Rec. S4449 (daily ed., March 23, 1978) (remarks of Senator Williams), reprinted in EEOC Legislative History at 538.

Likewise, while some members of Congress suggested that a showing of business purposes or age-related cost factors should be required to entitle plans to the Section 4(f)(2) exemption, their remarks were not directed to the meaning of the 1978 amendment. Rather, they referred to the meaning of the section as originally enacted in 1967. See 123 Cong. Rec. 34295 (Oct. 19, 1977) (remarks of Senator Williams), reprinted in EEOC Legislative History at 482; 124

Cong. Rec. H 2269 (daily ed., March 21, 1978)(remarks by Rep. Hawkins), reprinted in EEOC Legislative History at 528; 124 Cong. Rec. H 2277 (daily ed. March 21, 1978)(remarks of Rep. Waxman), reprinted in EEOC Legislative History at 535; 124 Cong. Rec. S 4450 (daily ed. March 23, 1978)(remarks of Senator Javits), reprinted in EEOC Legislative History at 539. As this Court observed in McMann, such "[l]egislative observations 10 years after the passage of the Act are in no sense part of the legislative history" of the original act. United Airlines Inc. v. McMann, 434 U.S. at 200 n.7. Nor are they a reliable "basis for inferring the meaning of a congressional enactment . . . because as time passes memories fade and a person's perception of his earlier intention may change."

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980).

Read as a whole, then, the legislative history adds nothing to the clear language of the amendment. Congress was concerned about mandatory retirement based on age and it amended section 4(f)(2) of the Act to expressly prohibit such provisions in otherwise bona fide benefit plans. It did not redefine or eliminate the subterfuge language, nor did it establish a new test for determining what benefit plan are bona fide. Accordingly, the Sixth Circuit's interpretation of the amendment must be rejected.

C. The Decision Below, If Upheld, Will Adversely Affect The Retirement Systems of Many States

If allowed to stand, the contrary decision of the court below will disrupt the retirement systems of almost every state in the country. Most of these retirement systems draw distinctions based on age and, while these systems all have valid public purposes, it is quite unlikely that these distinctions can satisfy the rigid age-related cost justification test adopted by the Sixth Circuit.

In addition to Ohio, at least ten states restrict disability retirement benefits to those disabled prior to regular retirement age. Employees disabled after regular retirement age are accorded regular retirement benefits.

See, e.g., Ala. Code § 36-27-16(b)(1); Haw. Rev. Stat. §§ 88-75, 88-76; Me. Rev. Stat. Ann. tit. 5, § 17904(1)(B); Md. Code Ann. art. 73B, § 11; Miss. Code Ann. § 25-11-113; N.H. Rev. Stat. Ann. § 100A:6; N.J. Rev. Stat. §§ 43:15A-42, 43:15A-43; Pa. Cons. Stat. Ann. tit. 71, § 5308(c); S.C. Code Ann. § 9-1-1560; Wash. Rev. Code Ann. §§ 41-40-210, 41-40-220; Wis. Stat. Ann. § 40.63(1).

Moreover, twenty-five states include other express age-related distinctions in establishing eligibility requirements for disability retirement benefits. Alaska Stat. §§ 14.25.130, 39-35-410; Ariz. Rev. Stat. Ann. § 38-781.31; Ark Stat. Ann. §24-3-208; Colo. Rev. Stat. § 24-51-701; Conn. Gen. Stat.

§ 5-169(a); Ga. Code Ann. § 44-2-123; Idaho Code § 59-1313(2)(b); Ill. Rev. Stat. § 14-123; Kan. Stat. Ann. §74-4927(a); Mass. Gen. L. ch. 32, §§ 6, 7; Mich. Comp. Laws Ann. §§ 38.22, 38.23; Minn. Stat. Ann. § 352.113; Mo. Rev. Stat. §§ 104.410, 104.515.3(5); Mont. Code Ann. § 19-3-1002; N.M. Stat. Ann. §§ 10-11-10(D), (E); N.Y. Retire. & Soc. Sec. Law §§ 62, 63; N.C. Gen. Stat. § 135-106; R.I. Pub. Laws §§ 36-10-12, 36-10-13, 36-10-14; S.D. Codified Laws Ann. §§ 3-12-98, 3-12-103; Tenn. Code Ann. §§ 8-36-501, 8-36-502: Tex. Code Ann. ch. 21, § 24.202; Utah Code Ann. §§ 460, 461: Vt. Stat. Ann. tit. 3, §§ 460, 461: Va. Code Ann. § 51-111.56; Wyo. Stat. § 9-3-422.

Only thirteen states make no age-based distinctions in dete.mining eligibility for disability retirement

benefit, or distinguish only on the basis of years of service. See, e.g., Cal. Code. tit. 2, art. 3, § 21021; Del. Code Ann. tit. 29, § 5524; Fla. Stat. § 121.091(4); Ind. Code § 5-10.2-4-6; Iowa Code § 97B-50; Ky. Rev. Stat. Ann. §§ 61.600, 61.605, 61.615(e); La. Rev. Stat. Ann. §§ 42:581, 42:702; Neb. Rev. Stat. §§ 84-1317; 84-1323.01; Nev. Rev. Stat. § 286.620; N.D. Cent. Code §§ 54-52-17(3)(d), (4)(e); Okla. Stat. tit. 74, § 915(B); Or. Rev. Stat. § 237.171(1);W. Va. Code § 5-10-25.

In **McMann** the Court said that it was not convinced that Congress had intended to "undermine the countless bona fide retirement plans existing in 1967 when the Act was passed" and that "[s]uch a pervasive impact on bona fide existing plans should not be read into the Act without a clear, unambiguous

expression in the statute." Id. at 199. In response to the Court's admonition, Congress said in 1978 only that involuntary retirement should be unlawful. This Court should take Congress at its word and therefore reject the effort of the court below to add either a "substantial business purpose" or an "age-related cost justification" requirement to the statute. To do so would only disrupt many of the very plans that Congress intended to protect when it placed Section 4(f)(2) in the statute in the first place.

CONCLUSION

For the reasons set forth above, the Commonwealth of Pennsylvania respectfully requests that the decision below be reversed.

Respectfully submitted,

LeROY S. ZIMMERMAN
AttorneY General

SUSAN J. FORNEY
Senior Deputy Attorney General
(Counsel of Record)

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief Litigation Section

Office of the Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120

(717) 783-1471

December 14, 1988